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Commenter: Excel Telecommunications, Inc.
Applicant: BellSouth
State: Louisiana
Date: August 4, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of	)	
	)	
Second Application by BellSouth	)	
Corporation et al. for Provision of	)	CC Docket No. 98-121
In-Region, InterLATA Services in	)	
Louisiana	)	

COMMENTS OF EXCEL TELECOMMUNICATIONS, INC., IN OPPOSITION TO BELLSOUTH'S SECOND APPLICATION FOR INTERLATA AUTHORITY IN LOUISIANA

Excel Telecommunications, Inc. ("Excel") hereby submits its comments on the second Section 271 application for in-region interLATA authority in Louisiana filed by BellSouth Corporation et al. ("BellSouth") on July 9, 1998.

Excel is the fifth largest interexchange carrier in the United States, and is one of the fastest growing providers of telecommunications services in the country. Through resale and increasingly through use of its own facilities, Excel offers residential and business telephone, international service, paging, 800 service and calling cards to customers in all 50 states. While Excel currently offers predominantly interexchange service, it is also pursuing the provision of competitive local exchange services. Excel's wholly-owned subsidiaries are currently authorized to provide competitive local exchange service in over 30 states, including six states in BellSouth's region: Alabama, Florida, Louisiana, Mississippi, North Carolina and Tennessee. As of year end 1997, Excel and its subsidiaries provided service to over 5.5 million customers, the vast majority of whom are residential customers.

Excel believes BellSouth's application should be denied for a panoply of reasons. These comments will focus on two that are utterly dispositive. First, BellSouth has not shown eligibility for Track A treatment under Section 271. Second, it has not shown that it will exercise its "right to disconnect" network elements provided to competitive carriers, conferred by the Eighth Circuit's decision, in a manner consistent with its other obligations under the Act.

I. BELLSOUTH'S INTERCONNECTION AGREEMENTS WITH PCS PROVIDERS DO NOT ESTABLISH ELIGIBILITY FOR TRACK A.

Track A eligibility requires -- as a threshold matter, before examination of the 14-point competitive checklist or the public interest test even comes into play -- interconnection agreements with "competing" providers of predominantly facilities-based telephone exchange service to residential and business customers. 47 U.S.C. § 271(c)(1)(A). To establish Track A eligibility, BellSouth relies primarily on its interconnection agreements with five PCS providers. However, PCS providers do not "compete" with BellSouth's wireline service. PCS caters to a niche market, filling the special needs for mobility of certain high-end consumers. This Commission has correctly decided that communications services filling customers' special needs for mobility are "complementary" rather than "competitive" services.

BellSouth's own survey of PCS users, even though it is skewed to achieve the desired results, confirms that the predominant use of PCS is as a means of calling when away from the user's home or place of business. In that survey, 84% of the respondents said that they use PCS as an alternative when they are away from their own phone, rather than using the wireline service of friends or business associates. M/A/R/C Study at 4. The Commission has explained that PCS involves "installed technology and facilities [that] are specialized for use in mobile communications." For that reason, PCS products "largely complement, rather than substitute for, wireline local exchange." Application of NYNEX Corp. Transferor and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, 12 FCC Rcd 19985, ¶ 90 (1997). Id. PCS competition with wireline on a mass market scale "is currently precluded as a practical matter by the higher prices that mobile telephone service providers can charge." Id.

BellSouth argues that PCS is price competitive with wireline, on the basis of a study purporting to show, based on usage patterns, that PCS monthly charges are equivalent or lower than wireline charges for up to 15% of residential consumers in the New Orleans area. "Competitive Analysis of PCS Offerings in the New Orleans Major Metropolitan Area," atch. to Bannerjee Aff't ("Bannerjee Study). However, the 15% segment of residential consumers who are within a price band where Bannerjee finds PCS to be price competitive are consumers with very low usage patterns – less than 4 minutes a day of local calls (total incoming and outgoing). Bannerjee Study at 22. Moreover, the Study admits that it has not taken into account the high initial cost of PCS equipment. Bannerjee Study at 23-24. It seems highly unlikely that consumers with phone usage of less than 4 minutes a day would be indifferent to the high initial cost of PCS equipment. Moreover, it seems unlikely that such consumers would be attracted by the mobility and convenience features of PCS. And while

Bannerjee's study was confined to residential users, the low usage patterns for which Bannerjee found PCS to be price competitive would seem even more unlikely in the business sector than in the residential sector. Thus the Bannerjee Study actually disproves BellSouth's position.

BellSouth cites industry ads and press releases promoting PCS as a substitute for wireline service. Obviously, the industry – like the Commission – believes that there may come a day when PCS is a competitive substitute for wireline service. Application by BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 6245, ¶ 73 (1998) (PCS may be in "transition" to a competitive service). However, industry ads designed to hasten that day do not constitute proof that it has already arrived.

II. BELLSOUTH'S PROPOSAL TO PHYSICALLY DISCONNECT PREVIOUSLY COMBINED NETWORK ELEMENTS VIOLATES THE COMPETITIVE CHECKLIST.

Where a CLEC orders unbundled network elements that are connected in the incumbent's network, the Eighth Circuit has held -- we believe incorrectly -- that the incumbent may disconnect the elements before providing them to the CLEC. Iowa Utilities Board v. F.C C., 120 F.3d 753, 813 (8th Cir. 1997), cert. granted 118 S.Ct. 879 (1998). However, the Eighth Circuit did not hold that the incumbent may disconnect elements in a manner that violates its other obligations under the Act. Indeed, the explicit premise of the Eighth Circuit's decision was that the incumbent would provide the CLEC sufficient access to its network in order to achieve recombination. 120 F.3d at 813.

BellSouth states that, with certain exceptions, it will not provide network elements in combination unless the requesting carrier is willing to negotiate a price. Varner Aff't ¶ ¶ 67-69. Unless the requesting carrier agrees to BellSouth's price, the elements will be physically disconnected, requiring collocation to reconnect. Id. ¶ 71. There are two provisions of section 251 and the competitive checklist which would be violated by the manner in which BellSouth proposes to exercise its newly-established "right to disconnect": the requirement to provide "nondiscriminatory" access to network elements (§§ 251(c)(3), 271(c)(2)(B)(ii)), and the requirement to provide network elements in a manner that allows requesting carriers to combine them in order to provide telecommunications service (§ 251(c)(3)). This Commission, in its Order denying BellSouth interLATA authority in South Carolina, made the relevance of these provisions clear, by citing as one reason for denial BellSouth's failure to show that it made available disconnected elements in a manner that allows competing carriers to combine them in a practical and nondiscriminatory manner. Application of BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina, 13 FCC Rcd. 539, ¶ 206 (1997) ("South Carolina Order").

BellSouth proposes to comply with these requirements only by making collocation available as a means for the CLECs to reconnect disconnected elements. BellSouth Brief at 38-41. This proposal falls short.

Collocation would confine CLEC purchase of combined elements to areas where the CLEC is collocated. But CLECs frequently solicit customers whose principal office may be in an area where the CLEC is collocated, but who have satellite offices in other areas that they want to be serviced by a single carrier. Under BellSouth's proposal, the CLEC cannot serve the satellite locations through purchase of combined network elements, because it has no way of reconnecting those elements short of collocating at the ILEC central offices serving each satellite location. And even if the expense of collocation were warranted in order to serve that one satellite location, the 4-month period it typically takes to collocate (under BellSouth's own figures) would probably be unacceptable to a customer considering whether to switch its business from BellSouth. In addition, there may be limitations in physical collocation space. Thus BellSouth's proposal puts CLECs at a significant disadvantage in seeking business from significant customers.

Second, the cost of collocation is determined on a case-by-case basis. Thus there is no way of telling in advance how much it will cost to use collocation to recombine disconnected elements. In denying BellSouth's South Carolina application, the Commission cited BellSouth's failure to show "that there is actual commercial usage of physical collocation anywhere in its region for the purpose of recombining unbundled network elements." South Carolina Order, ¶ 205. While BellSouth refers to a list of physical collocation arrangements in its nine-state region, it does not show whether these arrangements are being utilized to reconnect physically-disconnected elements, and whether this has proved to be commercially feasible. BellSouth Brief at 36; Milner Aff't at ¶ 27 & Exh. WKM-2.

The Eighth Circuit decision did not specify the means of disconnection. Interconnection between different elements in a telephone network is customarily controlled by means of electronics or software rather than manually. Once the physical connection is initially established, it is much cheaper to disconnect and reconnect -- as service is discontinued or resumed – through system software rather than manually.[1] If the ILEC, when acting for its own purposes, controls disconnection and connection through an electronic process, then use of a much more expensive and disruptive physical process when the ILEC is providing network elements to competing carriers is discriminatory. Nothing in the Eighth Circuit's decision authorizes incumbents to exercise their "right to disconnect" in a discriminatory manner.

In addition to the unneeded and discriminatory cost burden, the choice of physical disconnection virtually guarantees that customers opting for competitive services will suffer service outages of indefinite duration when the competitive carrier seeks to reestablish connections -- service outages that will have an utterly devastating effect on competitors' ability to attract new business. Simply stated, no educated business customer or consumer will take the risk.

Even if BellSouth's own internal operations were not an appropriate analogue to the process of connections incident to provision of unbundled elements to a competitor, the Act does not give

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[1] The schedules of "glue charges" that have been proposed make it clear that the ILECs themselves utilize electronic rather than physical means. For example, in the New York Section 271 proceedings, Bell Atlantic - New York has proposed an initial "glue charge" of zero for residential POTS and $6 (Zone 1) or $2 (Zone 2) per month for business POTS, rising after a period of years to a level equalizing the cost of the unbundled platform to the cost of resold lines. Petition of New York Telephone Company for Approval of Its Statement of Generally Available Terms and Conditions pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for Inter LATA Entry pursuant to Section 271 of the Telecommunications Act of 1996, New York Public Service Commission Case 97-C-0271, Pre-Filing Statement of Bell Atlantic - New York (April 6, 1998) at 9. It is clear that these amounts have nothing to do with the cost of physical reconnection.

ILECs carte blanche to impose unneeded expense on the carrier requesting access. The ILEC must still show that the access it affords "offers an efficient competitor a meaningful opportunity to compete." Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan, 12 FCC Rcd 20543, ¶ 141 (1997). BellSouth has not shown that physically tearing wires out – with the attendant expense and risk of outage -- rather than electronic disconnection is consistent with offering efficient competitors a "meaningful opportunity to compete."

BellSouth also argues that electronic recombination would require it to "relinquish control over operations of the switch." BellSouth Brief at p. 40, quoting Local Competition Order, 11 FCC Rcd at 15708, ¶ 415. But the Commission has specifically stated that the incumbent would not be relinquishing control over operations of the switch if it were required to "receive the order and activate (or deactivate) the particular features on the customer line designated by the competing provider." Local Competition Order, 11 FCC Rcd at 15708, ¶ 415. And if the Eighth Circuit's holding means that the CLEC itself must activate the network software in order to achieve reconnection, then under the Eighth Circuit's decision the CLEC must be given sufficient access to perform that operation, even if some loss of control is involved. The Eighth Circuit specifically based its decision on the assumption that the incumbent LEC would "allow entrants access to their networks" as needed to recombine disconnected elements. Iowa Utilities Board, supra, 120 F.3d at 813.

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CONCLUSION

BellSouth's application for interLATA authority should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMENTS OF EXCEL TELECOMMUNICATIONS, INC., IN OPPOSITION TO BELLSOUTH'S SECOND APPLICATION FOR INTERLATA AUTHORITY IN LOUISIANA were served to each on the attached mailing list, either by Hand Delivery (as designated with an asterisk (*)), or by First Class Mail, postage prepaid, this 4th day of August, 1998.

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